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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

PLANNED PARENTHOOD  
FEDERATION OF AMERICA, INC., et al.,

Plaintiff,

vs.

THE CENTER FOR MEDICAL  
PROGRESS, et al.,

Defendants.

)  
) Case No. 3:16-CV-00236 (WHO)  
)  
) Hon. Donna M. Ryu  
)  
) Defendants CMP, BioMax, Daleiden and  
) Newman's Motion to Compel Production  
) of Documents from Plaintiffs; and  
) Defendant Newman's Motion to Compel  
) Response to Interrogatory from Plaintiffs  
)  
)  
) Hearing Date: Jan. 10, 2019, 11:00 a.m.  
) Oakland Courthouse, Courtroom 4  
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1 **NOTICE OF MOTION**

2 TO PLAINTIFFS AND THEIR ATTORNEY(S) OF RECORD:

3 PLEASE TAKE NOTICE THAT on January 10, 2019, at 11:00 a.m., in Courtroom 4 of the  
4 Honorable Donna M. Ryu at the United States District Court for the Northern District of  
5 California, Oakland Courthouse, 3rd Floor, 1301 Clay Street, Oakland, CA 94612, (1) the Center for  
6 Medical Progress (“CMP”), BioMax Procurement Services, LLC (“BioMax”), David Daleiden,  
7 and Troy Newman, will and hereby do move this Court for an order compelling Plaintiffs Planned  
8 Parenthood Federation of America (“PPFA”), Planned Parenthood: Shasta-Diablo dba Planned  
9 Parenthood Northern California (“PPNC”), Planned Parenthood Mar Monte (“PPMM”), Planned  
10 Parenthood of the Pacific Southwest (“PPPSW”), Planned Parenthood Los Angeles (“PPLA”),  
11 Planned Parenthood/Orange and San Bernardino Counties (“PPOSBC”), Planned Parenthood  
12 Central Coast California (“PPCCC”), Planned Parenthood Pasadena and San Gabriel Valley  
13 (“PPPSGV”), Planned Parenthood of the Rocky Mountains (“PPRM”), Planned Parenthood Gulf  
14 Coast (“PPGC”), and Planned Parenthood Center for Choice (“PPCFC”) (collectively  
15 “Plaintiffs”) to produce documents responsive to CMP’s and Newman’s separate document  
16 requests relating to Plaintiffs’ fetal tissue programs; (2) Troy Newman will and hereby does move  
17 this Court for an order compelling Plaintiffs to provide an appropriate response to his interrogatory  
18 relating to Plaintiffs’ fetal tissue programs; and (3) CMP, BioMax, and Daleiden will and hereby do  
19 move this Court for an order compelling Plaintiffs to produce documents responsive to their  
20 document requests relating to their Cal. Pen. Code § 633.5 affirmative defense.

21 These motions are made on the grounds that said documents are relevant to the subject  
22 matter of the action and do not relate to privileged matters, and the refusal to produce them is  
23 without justification. This motion will be based on this Notice of Motion and Motion, the  
24 Memorandum of Points and Authorities filed herewith, the previously filed Declaration of Paul M.  
25 Jonna at Dkt. 326-1, the previously filed congressional reports at Dkt. 303-3 and 307, the previously  
26 filed email at Dkt. 350-3, and the concurrently filed Declarations of Paul M. Jonna, Edward L.  
27 White, Jeffrey M. Trissell, and David Daleiden.

1                                   **MOTION TO COMPEL REGARDING PLAINTIFFS’**  
2                                   **FETAL TISSUE PROCUREMENT PROGRAMS**

3           Defendants hereby move the Court for an order compelling Plaintiffs to produce documents  
4 responsive to CMP’s document requests nos. 4, 8, 10, 11, 23, 26, 27, 48, 121, and 131, and Newman’s  
5 document request no. 16 and to respond fully to Newman’s interrogatory no. 8.<sup>1</sup> In Plaintiffs’ own  
6 words, a central purpose of this lawsuit is “to recover damages for the ongoing harm to Planned  
7 Parenthood emanating from the video smear campaign.” Dkt. 59, ¶ 12.

8           As explained herein, the document requests and interrogatory at issue seek information  
9 relevant to a *critical* factual dispute at the heart of this case: whether, and the extent to which,  
10 Plaintiffs engaged in illegal acts. Did, as Plaintiffs allege, Defendants engage in a “smear campaign” by  
11 falsely claiming that Plaintiffs violated the law, when in reality Plaintiffs have fully complied with the  
12 law? Or did, as Defendants allege, Plaintiffs actually violate the law?

13           The requested written discovery generally falls into five categories, which establish the  
14 veracity of Defendants’ allegations that Plaintiffs: (1) schemed to profit from the sale of fetal tissue;  
15 (2) modified abortion procedures to facilitate such profiting; (3) violated the federal partial-birth  
16 abortion ban to facilitate such profiting; (4) procured tissue from born-alive infants to facilitate such  
17 profiting; and (5) procured and sold fetal tissue without donor consent. Discovery concerning the  
18 extent to which Plaintiffs violated various laws<sup>2</sup> by engaging in such acts is *highly* relevant in this case.  
19 If, for example, the requested discovery indicates that Plaintiffs schemed to illegally profit from the  
20 sale of fetal tissue, or engaged in illegal partial birth abortions, then Plaintiffs’ allegation of a “smear  
21 campaign” through which Defendants allegedly proximately caused extensive damages to law-abiding  
22 entities completely falls apart. Such evidence would also be relevant to impeach any Plaintiffs that  
23 falsely claimed they have fully complied with the law, and would bolster a public policy defense since

24 \_\_\_\_\_  
25 <sup>1</sup> These requests are laid out verbatim (and, if appropriate, as narrowed), in Defendants’ Separate  
26 Statement. The original written discovery, and Plaintiffs’ responses, are also attached to the  
27 declarations of Paul M. Jonna (counsel for CMP), and Edward L. White (counsel for Newman).

28 <sup>2</sup> See, e.g., 42 U.S.C. § 289g-2(a) (prohibiting fetal tissue profits); 42 U.S.C. §§ 289g-1 (informed  
consent and non-alteration of abortion methods); 18 U.S.C. § 1531(a) (partial-birth abortion  
illegality); 1 U.S.C. § 8 (Born-Alive Infants Protection Act of 2002).

1 the enforcement of contracts to conceal illegal activities is highly disfavored. Given the centrality of  
2 this factual dispute to this case, and the fact that Plaintiffs seek *millions* of dollars in damages—which  
3 could potentially be trebled under RICO—the requested discovery is clearly “relevant to any party’s  
4 claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1).

5 Plaintiffs initially refused to produce any documents whatsoever in response to Defendants’  
6 requests. *See* Jonna Decl., Ex. 2; White Decl., Ex. 8 & 11 (original responses). After meet and confer  
7 efforts, Plaintiffs ultimately agreed to produce limited documents, but only in response to category 1  
8 above, *i.e.*, Plaintiffs’ scheme to profit from the sale of fetal tissue. *See* Jonna Decl., Ex. 3; White Decl.,  
9 Ex. 9 & 12 (amended responses); *see also* Dkt. 326-1, at 16–70 (relevant meet and confer  
10 correspondence). But Plaintiffs only agreed to provide documents in response to five of CMP’s  
11 requests, Nos. 6, 9, 18, 28, and 29. *See* Trissell Decl., ¶ 2 (explaining Plaintiffs’ production).

12 After further meet and confer discussions, Plaintiffs agreed to produce “non-publicly available  
13 documents that PPFA provided to the [Senate Judiciary Committee] and [House Energy &  
14 Commerce Committee] that relate to fetal tissue as requested.” Letter from Bomse to Jonna (Jun. 26,  
15 2018) (Dkt. 326-1 at 129); *see also* Email from Bomse to Jonna (Aug. 2, 2018, 10:55 p.m.) (Dkt. 326-1 at  
16 142) (describing contents). But Plaintiffs would only agree to produce those documents if Defendants  
17 waived any right to seek additional documents. *See id.* Further, that proposal had “caveats” of certain  
18 documents which Plaintiffs had produced to Congress that Plaintiffs were unwilling to produce here.  
19 Email from Jonna to Bomse (Sep. 10, 2018, 4:35 p.m.) (Dkt. 326-1 at 137–38). Finally, that proposal  
20 would not include any internal emails regarding Plaintiffs’ fetal tissue programs. *Id.* As a result, the  
21 meet and confer process broke down, and Plaintiffs ultimately refused to produce any other  
22 documents in response to the categories of information listed above. Plaintiffs also refused to respond  
23 to Newman interrogatory no. 8 by identifying each person (by name, address, and place of  
24 employment) who was employed by, or volunteered for, Plaintiffs who was responsible for compliance  
25 with fetal tissue donation and disposal laws and regulations. Plaintiffs objected on the basis of  
26 relevance, proportionality, burden, privacy, and attorney-client privilege.

27 Defendants request that the Court order Plaintiffs to produce documents, and respond fully  
28 to the interrogatory, as laid out in Defendants’ Separate Statement.



1     **1.     Proportionality Analysis.**

2           “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any  
3 party’s claim or defense and proportional to the needs of the case, considering the importance of the  
4 issues at stake in the action, the amount in controversy, the parties’ relative access to relevant  
5 information, the parties’ resources, the importance of the discovery in resolving the issues, and  
6 whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P.  
7 26(b)(1). For requests subject to a motion to compel, “the moving papers must detail the basis for the  
8 party’s contention that it is entitled to the requested discovery and must show how the proportionality  
9 and other requirements of Fed. R. Civ. P. 26(b)(2) are satisfied.” N.D. Cal. Civ. L.R. 37-2.  
10 Establishing proportionality is a joint responsibility, where the moving party first establishes relevance  
11 and then the opposing party raises any burden objections. *Polaris Innovations Ltd. v. Kingston Tech. Co.,*  
12 *Inc.*, No. CV 16-00300 CJC (RAOx), 2017 WL 3275615, at \*6 (C.D. Cal. Feb. 14, 2017).

13           Here, Defendants’ document requests (as narrowed) seek communications via search terms  
14 and custodians and specific documents such as manuals and policies. Therefore, they do not believe  
15 there is any proportionality concern with respect to documents. *See* Sep. Stmt. Moreover, Plaintiffs  
16 have produced hardly any documents with respect to their fetal tissue procurement programs or  
17 Defendants’ published allegations against them. *See* Trissell Decl., ¶¶ 3–16 (explaining Plaintiffs’  
18 meager production). That Plaintiffs have already hand-picked and produced some relevant  
19 documents does not defeat Defendants’ right to receive what they have requested. Otherwise,  
20 parties in any case could make a mockery of the discovery rules by withholding potentially damaging  
21 documents, producing a large volume of innocuous documents, and then arguing that they have  
22 already produced enough so nothing further needs to be produced.

23           As discussed herein, the requested discovery is highly important to the “issues at stake in the  
24 action.” Fed. R. Civ. P. 26(b)(1). Defendants seek key documents which form the centerpiece of  
25 their defense. Defendants also seek via this motion to compel information that is solely within  
26 Plaintiffs’ control. *See id.* Finally, Plaintiffs are eleven large corporations that possess sufficient  
27 resources to search for and produce the requested documents. *See id.* With respect to emails,  
28 although Defendants agreed to examine their email accounts to determine how many existed that

1 were responsive to Plaintiffs’ requests, and then confer with Plaintiffs about the burden of  
2 producing them, Plaintiffs have steadfastly refused to do the same. *See* Email from Jonna to Bomse  
3 (Apr. 19, 2018, 1:48 p.m.) (Dkt. 326-1 at 98–101); Email from Jonna to Bomse (Jun. 11, 2018, 10:17  
4 a.m.) (Dkt. 326-1 at 111–12); Letter from Bomse to Jonna (Jun. 26, 2018) (Dkt. 326-1 at 130).

5 Producing the discrete categories of requested documents, and running word searches for  
6 the requested emails, is not disproportionately burdensome as they are the key documents  
7 Defendants need to establish their affirmative defenses and will be divided among eleven corporate  
8 plaintiffs. Moreover, any claim of burden would strain credulity. As outlined in the Separate  
9 Statement, the emails which Defendants seek are those with four tissue procurement companies. It  
10 should not be difficult to search for e-mails between four tissue procurement companies and those  
11 persons at each affiliate responsible for overseeing tissue procurement.

## 12 2. Privacy Analysis.

13 Plaintiffs claim a right to privacy, which is inapplicable in the context of this lawsuit. Plaintiffs  
14 brought this lawsuit—an intrinsically public affair—*expressly* challenging the allegations of criminality  
15 central to the Defendants’ videos, and now seek to shield themselves from discovery regarding those key  
16 claims. But “[a] party may [ ] waive [its] privacy rights by putting the contents at issue in a case.”  
17 *Weiland v. City of Concord*, No. 13-CV-05570-JSC, 2014 WL 3883481, at \*2 (N.D. Cal. Aug. 7, 2014).

18 Here, the truth of Defendants’ public statements about Plaintiffs are central to this case.  
19 Thus, the high relevance of the documents Defendants seek outweighs any privacy concerns  
20 Plaintiffs assert, even if remotely applicable. *See Stallworth v. Brollini*, 288 F.R.D. 439, 444 (N.D.  
21 Cal. 2012) (privacy claims are subject to a balancing test). Moreover, Plaintiffs waived any privacy  
22 interest by filing this lawsuit. The mere fact that this case involves abortion does not change the  
23 analysis—there is no “Fourteenth Amendment objection” like there is a “First Amendment  
24 objection.” In *Nw. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), a partial-birth abortion  
25 case, the court explained that privacy, even in the abortion context, is a sliding scale where the  
26 Court must weigh interests. There, the court unequivocally stated that “[t]he concerns that the  
27 hospital has articulated do not necessarily justify withholding probative evidence from the  
28 government,” but quashed the subpoena because the government could not articulate what it hoped

1 to learn from the hospital records. *Id.* at 927, 930. Here, in contrast, there are specific reasons  
2 (discussed herein) why Defendants need the documents they seek.<sup>3</sup>

### 3. Relevance Analysis.

4 “[E]vidence is relevant if it has any tendency to make more or less probable a fact that is of  
5 consequence in determining the action.” Order, Dkt. 226 at 10, n.7 (quotation marks, ellipses, and  
6 brackets omitted). In fact, “[g]iven the broad scope of discovery permitted by the Federal Rules,” any  
7 “position that discovery must be narrowly circumscribed is untenable.” *Id.* at 10:13–15. Generally,  
8 parties are entitled to test each other’s claims. *Id.* at 12:24–25. “[T]he party opposing discovery has the  
9 burden of showing that discovery should not be allowed, and also has the burden of clarifying,  
10 explaining and supporting its objections with competent evidence.” *Id.* at 5:26–28.

#### 3.1. Factual Relevance Explanation.

12 Here, as stated above, the requested written discovery falls into five categories all related to  
13 Defendants’ public statements about Plaintiffs engaging in illegal activities, which Plaintiffs assert  
14 proximately caused their alleged damages and whose veracity Defendants assert establishes their  
15 affirmative defenses. Given the broad scope of discovery, the requested documents and information  
16 would tend “to make more or less probable a fact that is of consequence in determining the action,”  
17 Order, Dkt. 226 at 10, n.7, by testing Plaintiffs’ claim that they fully complied with all laws. Whether  
18 Plaintiffs did, or did not, illegally scheme to profit from fetal tissue sales, alter abortions to secure more  
19 fetal tissue, commit partial-birth abortions, fail to obtain informed consent for fetal tissue donation, or  
20 kill infants born alive, is highly relevant to: (1) the veracity of the many assertions in the Complaint  
21 (expressly incorporated into every cause of action) that Plaintiffs were falsely accused of wrongdoing;  
22 (2) the credibility of Plaintiffs and Defendants considering the many statements that they have made

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24 <sup>3</sup> Plaintiffs have also asserted that certain documents they produced to Congress were privileged, but  
25 that the production of them to Congress did not waive the privilege. *See* Dkt. 326-1 at 129, 136–37.  
26 Defendants dispute the non-waiver. *E.g., United States v. Ruehle*, 583 F.3d 600, 612 (9th Cir. 2009).  
27 Yet, because Plaintiffs tentatively offered to “produce the [documents] if defendants would agree that  
28 any such production would not constitute a waiver of the privilege,” Dkt. 326-1 at 137, Defendants  
request that the Court order Plaintiffs to produce the documents without waiver, and the parties can  
later litigate whether any privilege applies.

1 about Plaintiffs' wrongdoing (or lack thereof); (3) the issue of whether Defendants proximately caused  
2 damages to Plaintiffs through false claims about Plaintiffs' illegal acts; and (4) defenses premised upon  
3 the illegality of Plaintiffs' acts, such as public policy, unclean hands, and Cal. Penal Code § 633.5 (which  
4 are discussed in detail herein).

5 For example, Defendants request that the Court order Plaintiffs to produce policies regarding  
6 "compliance with the partial-birth abortion law." (CMP RPD 48). Defendants' first and last press  
7 releases state that Plaintiffs have a cavalier approach to compliance with the partial-birth abortion  
8 ban, such that Plaintiffs had no problem violating it for the purpose of facilitating fetal tissue sales.  
9 Daleiden Decl., ¶¶ 5, 15, Exs. 19, 29. Plaintiffs' policies regarding the ban will shed light on the  
10 veracity of Defendants' public statements, as well as Plaintiffs' denials of those statements.

11 Additionally, Defendants request policies concerning the "use of digoxin or other feticides."  
12 (CMP RPD 9). Defendants' fourth, eighth, and eleventh press releases discuss the two basic means of  
13 ensuring fetal demise in an abortion: dismemberment and poison. They further discuss how fetal tissue  
14 that has been poisoned cannot be harvested, and point out that, since the subjects of those press releases  
15 offer to deliver intact fetuses that were not poisoned, the fetuses they are delivering may be born-alive  
16 infants. Daleiden Decl., ¶¶ 8, 12, 15, Exs. 22, 26, 29. Plaintiffs' policies regarding feticidal poisons will  
17 shed light on Defendants' (and a whistleblower's) claims that the perverse incentives here led to  
18 Plaintiffs delivering born-alive infants to companies for sale of their body parts.

19 Defendants also seek policies concerning "management/prevention of transient fetal  
20 survival/out-of-center deliveries, and 2nd-trimester and later abortion care, particularly cervical  
21 preparation, and use of D&E vs. induction." (CMP RPD 24). Defendants' fourth, fifth, seventh, and  
22 ninth press releases discuss intact fetuses generally. Daleiden Decl., ¶¶ 8, 9, 11, 13, Exs. 22, 23, 25, 27.  
23 In one, a whistleblower named Holly O'Donnell stated that she was instructed to procure tissue from  
24 a born-alive infant. In another, a separate fetal tissue procurement technician discussed how a fetus  
25 "just fell out." Living fetuses that "f[a]ll out" are born-alive infants. Thus, Defendants publicly  
26 claimed that Plaintiffs engage in murder or manslaughter to facilitate their fetal tissue transfer  
27 programs. The requested policies on "transient fetal survival" and viable "second-trimester  
28 abortion[s]" will shed light on the veracity of Defendants' claims.

1           Additionally, Defendants seek policies concerning “mechanical vacuum aspiration.” (CMP  
2 RPD 24). Defendants’ second press release highlighted one abortion provider’s offer to use a “less  
3 crunchy” technique—mechanical vacuum aspiration—to procure fetal tissue. Daleiden Decl., ¶ 6,  
4 Ex. 20. The doctor stated that by using mechanical vacuum aspiration, she would be increasing the  
5 length of, and the pain of, the abortion procedure but that she may be willing to do so anyway.  
6 Plaintiffs’ policies regarding mechanical vacuum aspiration, and when it is appropriate to use it,  
7 would shed light on the profit incentive which would motivate a doctor to switch to that procedure  
8 even if it is not ideal for the patient.

9           Further, Defendants seek “[a]ny records or summaries (which may be appropriately  
10 redacted) of abortion cases involving an intact procedure, fetal expulsion, or transient fetal survival,  
11 for Plaintiffs PPLA, PPPSW, PPOSBC, PPGC, and PPCFC.” (CMP RPD 24.) These “records or  
12 summaries,” like those Plaintiffs produced in the partial-birth abortion cases from 2004–2008, are  
13 relevant for a variety of reasons (as discussed previously concerning the five categories of requested  
14 documents).<sup>4</sup> Defendants learned from numerous individuals during their investigation that intact  
15 fetal cadavers are more valuable. Plaintiffs were paid per organ. Where a fetus was extracted whole, it  
16 was easier for the technician to dissect it and find each of the useable organs. Thus, an analysis of the  
17 total number of intact fetuses would reveal information about Plaintiffs’ profit potential.

18           Moreover, as Defendants’ investigation uncovered, Plaintiffs would modify their abortion  
19 procedures to facilitate the procurement of intact fetal cadavers (as much as possible). If the number  
20 of intact cadavers exceeds the average number that are found in clinics not selling the cadavers, then  
21 this would provide corroborating evidence that Plaintiffs were illegally modifying their procedures to  
22 sell the fetuses. Defendants also discovered that Plaintiffs were modifying their procedures to the  
23 point of extracting born-alive infants, and then killing them. This practice is not uncommon among

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24           <sup>4</sup> See *NAF v. Ashcroft*, No. 03 CIV. 8695 (RCC), 2004 WL 555701, at \*1 (S.D.N.Y. Mar. 19, 2004)  
25 (granting motion to enforce subpoena for production of abortion medical records); *PPFA, Inc. v.*  
26 *Ashcroft*, No. C03-4872 PJH, 2004 WL 432222, at \*1 n. 1 (N.D. Cal. Mar. 5, 2004) (denying motion  
27 to compel further abortion medical records because “PPFA had [already] produced seventeen  
28 patients’ medical records” and “PPGG [already] produced patient medical records for all [] post-  
sixteen week abortions performed at PPGG over the past three years”).

1 abortion providers due to an ideological belief that an abortion provider's mistake in delivering the  
2 infant alive, instead of killing it first, should not grant the infant rights. *See* Daleiden Decl., ¶ 25. Thus,  
3 Defendants believe there may be records or summaries where Plaintiffs candidly discuss cases  
4 involving born-alive infants. This is relevant to establish the truth of Defendants' claims that Plaintiffs  
5 were modifying abortion procedures to deliver living infants that were then killed and sold.

### 6           **3.2. Defendants' Substantial Veracity Defense.**

#### 7                   **3.2.1. Background law on the Proximate Causation and First Amendment bars to** 8                   **publication damages.**

9           In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 964 F. Supp. 956 (M.D.N.C. 1997) (*Food Lion I*),  
10 *aff'd*, 194 F.3d 505 (4th Cir. 1999) (*Food Lion II*), the district court held that damages that flow from  
11 the publication of a broadcast are proximately caused by the publication, and not any preceding illegal  
12 or tortious activity, such as trespass or fraud. *Food Lion I*, 964 F. Supp. at 966. In *Food Lion II*, the  
13 Fourth Circuit affirmed, but on a different basis and without repudiating the reasoning of the district  
14 court. The Fourth Circuit held that all of the damages at issue were *reputational* publication damages,  
15 which are barred by the First Amendment unless the plaintiff proves defamation. *Food Lion II*, 194  
16 F.3d 5 at 522. The *Food Lion II* rationale is far more developed, and flows from Supreme Court cases,  
17 including *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).<sup>5</sup>

18           To ensure that the plaintiff does not improperly receive publication-damages, the Court  
19 assumes, and instructs the jury, that the defendant's speech **must be assumed as true for all**  
20 **purposes**. If the plaintiff "d[oes] not challenge the content of the broadcast by bringing a libel suit,"  
21 then "[f]or the purposes of . . . th[e] case, it is assumed that the content of the [defendant's]  
22 **broadcast about [the plaintiff] [i]s true.**" *Food Lion I*, 964 F. Supp. at 959; *see also id.* at 962 ("[T]he  
23 broadcast must be assumed to be true") (emphasis added); *Med. Lab. Mgmt. Consultants v. ABC, Inc.*,  
24 30 F. Supp. 2d 1182, 1199 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002) ("In *Food Lion* and  
25 *Frome v. Renner*, the courts assumed the truth of the broadcast because the plaintiffs failed to bring a

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26           <sup>5</sup> This Court has accepted the reasoning of both *Food Lion I* and *Food Lion II*, Order, Dkt. 124 at 32:8-  
27 34:7 (*Food Lion I*), 34:8-36:11 (*Food Lion II*), as has generally the Ninth Circuit. *Animal Legal Def. Fund*  
28 *v. Wasden*, 878 F.3d 1184, 1195 n.9 (9th Cir. 2018).

1 defamation or libel claim.”); *Frome v. Renner*, No. 97 CIV 5641, 1997 WL 33308718, at \*1 (C.D. Cal.  
2 Oct. 1, 1997) (“[T]he Court did not consider either the tape or the transcript.”).

3 Courts take a holistic and practical look at “the injuries actually sustained” and the purpose  
4 of the plaintiff’s artful pleading. *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 530–33  
5 (6th Cir. 2007) (“[A]lthough Compuware . . . purports to seek only rescission of the contract and return  
6 of the sums it paid to Moody’s, it is inescapable that Compuware seeks compensation for harm caused  
7 to its reputation. . . . [I]ts only injuries are defamation-type harm.”). If damages are the type recoverable  
8 via a defamation claim, and the plaintiff does not bring a defamation claim, the damages are not  
9 recoverable. See *La Luna Enterprises, Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 392 (S.D.N.Y. 1999).

10 3.2.2. *The Court should rule that Defendants’ public statements about Plaintiffs must be*  
11 *accepted as true for all purposes.*

12 Here, in response to the *Food Lion* cases, Plaintiffs first argued that they should be able to  
13 recover damages stemming from Defendants’ publications without proving defamation, by proving  
14 that the damages were not proximately caused by “the content of the videos.” Rather, Plaintiffs  
15 argued, “the mere fact of identifying abortion providers by name and image caused the increase in  
16 harassment alleged in the FAC.” Dkt. 99 at 12:25-26. The Court disagreed, holding instead that  
17 Plaintiffs are limited to “damage [that was] the ‘direct’ result of defendants’ fraud in securing  
18 access to plaintiffs’ private conferences and clinics.” Order, Dkt. 124 at 33:17-19; see also *id.* at 34:2-  
19 6 (“[P]laintiffs may have implemented security measures simply upon discovering defendants’  
20 breaches before the full extent of the publications was known and the backlash from them  
21 occurred. . . . [The *Food Lion* cases] may at summary judgment or trial prevent plaintiffs from  
22 recovering on some categories of damages.”).

23 Recognizing that the allowable damages that the Court referenced would be extremely small, if  
24 not non-existent, Plaintiffs have switched gears. Now, Plaintiffs allege that all of their “damages from  
25 publication” stem from Defendants’ public statement that Plaintiffs were “engaging in a criminal  
26 conspiracy to make money off of aborted fetal parts.” Dkt. 258 at 3; see also Dkt. 343-5 at 11:4–7.  
27 Apparently, Plaintiffs believe that even though they have not pleaded defamation, if they prove  
28 defamation, then they can recover reputational-publication damages. This is incorrect. The failure to

1 plead defamation is fatal to many of Plaintiffs' categories of claimed damages.

2       In light of the governing law discussed above, Defendants anticipate that the Court will  
3 instruct the jury that they must assume that the statements made in Defendants' videos are true.  
4 Defendants further expect that the Court will then instruct the jury that it must determine whether  
5 the claimed damages flow from Defendants' publications because, if they do, they are unrecoverable.  
6 If, however, the Court disagrees, then Defendants will be severely prejudiced without the discovery  
7 which is the subject of this motion. Thus, at this juncture, Defendants need either (1) a ruling from the  
8 Court that everything that Defendants have said about Plaintiffs (including the allegations of illegal  
9 conduct) will be assumed as true for summary judgment and trial purposes; or (2) an order overruling  
10 Plaintiffs' relevance objection and requiring Plaintiffs to produce the withheld discovery noted herein.

11                     3.2.3. *In the alternative, the Court should grant discovery regarding the affirmative*  
12                     *defense of substantial veracity.*

13       If the Court does not rule that Defendants' public statements about Plaintiffs' illegal acts must  
14 be accepted as true for all purposes, then Defendants have the right to obtain discovery establishing,  
15 and then present evidence to the jury establishing, that Defendants' statements about Plaintiffs were  
16 substantially true. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991) ("Factual truth is  
17 a complete defense to defamation."); *see also Ringler Assocs. v. Maryland Cas. Co.*, 80 Cal. App. 4th  
18 1165, 1180–81 (2000).

19       With respect to Plaintiffs' current strategy, it appears to be an argument that stems from 42  
20 U.S.C. § 289g-2(e)(3), which lists the only allowable reimbursable costs relating to the transfer of fetal  
21 tissue. Defendants believe that Plaintiffs will argue that, although they may have violated § 289g-2 by  
22 receiving payment for costs which are not legally reimbursable, overall they still did not make a net profit  
23 (or the profit made was nominal); therefore, any statement by Defendants that Plaintiffs were  
24 intentionally violating the law *for the purpose of* profiting, as opposed to unintentionally violating the law,  
25 would be false. *See* Dkt. 303-3 at 396. Defendants dispute Plaintiffs' alleged honest intent—and believe  
26 Plaintiffs willingly made significant profits—but Plaintiffs may be able to convince a jury of honest intent  
27 if they are able to avoid providing the requested discovery. Thus, Defendants need the requested  
28 discovery to show not only that Plaintiffs illegally profited, but that they intended to profit.



1           **3.3. Defendants’ Causation Defense.**

2           In the Complaint, Plaintiffs put the truth or falsity of Defendants’ public statements about  
3 Plaintiffs and their practices directly at issue. *See, e.g.*, Dkt. 59, ¶¶ 12, 45, 94, 113. Yet, during the  
4 litigation, Plaintiffs have stated that while “Defendants will be free to argue that the other ancillary  
5 accusations concerning [illegal acts] may have triggered the public reaction that required substantial  
6 security increases . . . Plaintiffs are not required to prove that[, and Defendants are not entitled to  
7 discovery regarding whether,] every statement in the videos is false.” Dkt. 326-1 at 92 (citations  
8 omitted). This is incorrect. “[A] defamatory meaning must be found, if at all, in a reading of the  
9 publication as a whole.” *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036, 1040 (9th Cir. 1998); *see*  
10 *also Stevens v. Storke*, 191 Cal. 329, 334 (1923). Plaintiffs seek millions of dollars of damages in light  
11 of the alleged “smear campaign,” but cannot avoid discovery that would clearly shed upon the  
12 extent to which Defendants’ allegations about Plaintiffs’ conduct are true. Moreover, since  
13 Plaintiffs admit that Defendants can argue the veracity of their claims at trial, they are per se  
14 relevant and broad discovery concerning these claims should be allowed.

15           Here, Defendants publicly stated that Plaintiffs profited from selling fetal tissue and  
16 committed other crimes. But the “other” illegal conduct was expressly done to facilitate the  
17 profiteering—it was not done in a vacuum. Defendants’ public statements about Plaintiffs began in  
18 the summer of 2015. *See* Daleiden Decl., ¶ 3, Ex. 18. At that time, CMP began releasing the results  
19 of its investigative journalism study into illegal practices in the fetal tissue procurement industry,  
20 with new information published on a weekly basis. *Id.* CMP’s blog page captured the publication  
21 timeline. *Id.* Daleiden’s declaration provides descriptions and links to the CMP press releases  
22 published in 2015 as well as the actual press releases. *Id.* at ¶¶ 5–15, Exs. 19–29.

23           As the press releases demonstrate, along with their accompanying video footage, Defendants’  
24 public statements about Plaintiffs regarding other alleged illegalities, such as violations of the partial-  
25 birth abortion ban, were not ancillary—they were key allegations Defendants made in their press  
26 releases. *See id.*, Ex. 11, First Press Release, “Planned Parenthood’s Top Doctor, Praised by CEO,  
27 Uses Partial-Birth Abortions to Sell Baby Parts.” Those allegations simply do not make sense when  
28 divorced (as Plaintiffs attempt to do) from the allegation that Plaintiffs were selling fetal tissue for

1 profit: Plaintiffs violated the partial-birth abortion ban, violated HIPAA, and obtained fetal tissue  
2 without donor consent, for the purpose of . . . selling fetal tissue at a loss? No, Plaintiffs violated those  
3 laws precisely because they had a perverse financial incentive to do so. The allegations simply cannot  
4 be split up; Defendants’ statements must be read together. *See Van Vactor v. Walkup*, 46 Cal. 124, 134  
5 (1873) (“[T]he Court below fell into the error of separating the alleged libel into two parts, and  
6 construing each part separately, without reference to the other.”). Because Plaintiffs seek damages  
7 flowing from Defendants’ public statements, Defendants are entitled to discovery to prove that their  
8 public statements about Plaintiffs were true. Otherwise, as noted above, Defendants are entitled to a  
9 jury instruction that all their statements must be accepted as true.

10 Plaintiffs have further stated that “[t]here is no fair reading of the FAC that would suggest that  
11 Plaintiffs’ intended to discuss anything the Human Capital Project said about partial-birth abortion,  
12 consent to donate fetal tissue, or ‘live births.’” Dkt. 343-5 at 8:22–24. Plaintiffs, however, have  
13 repeatedly claimed (in the Complaint and elsewhere) that they are innocent of *any* wrongdoing, thus  
14 rendering all of CMP’s allegations a “defamatory” smear campaign. Moreover, just because Plaintiffs  
15 do not plan on talking to the jury about partial-birth abortion or live births does not mean that  
16 Defendants cannot. In fact, Defendants fully intend to do so. Defendants believe, and Plaintiffs’ own  
17 evidence shows, that those issues drove the public’s reaction to the alleged “smear campaign.”  
18 Defendants will argue to the jury that other revelations in the videos, from infanticide to Dr. Nucatola  
19 describing converting to breech and “crush[ing] above and crush[ing] below” while munching on her  
20 salad and drinking wine, were the driving factors of the public’s reaction.

21 Stated differently, while Plaintiffs contend that Defendants harmed them by generating public  
22 animosity against them through *false* allegations of illegal conduct, Defendants contend that the  
23 proximate cause of any adverse reaction toward Plaintiffs was *their own illegal conduct*; as such,  
24 whether Plaintiffs engaged in illegal acts is directly relevant to proximate cause and Defendants are  
25 entitled to obtain discovery on that issue. *See Food Lion I*, 964 F. Supp. at 963 (plaintiff’s own  
26 improper food handling practices proximately caused diminished consumer confidence, not  
27 defendant’s publication of that information); *see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184,  
28 1195 n. 9 (9th Cir. 2018) (“We disagree with the . . . suggestion that” “publication of a story about the

1 facility” would be “harm from gaining access to property by misrepresentation”; “This approach . . .  
2 places a value judgment on the reporting itself and undermines the First Amendment right to critique  
3 and criticize.”).

#### 4           **3.4. Defendants’ Other Defenses**

##### 5                   3.4.1. *Unclean Hands*

6           The doctrine of unclean hands “bars relief to a plaintiff who has violated conscience, good faith  
7 or other equitable principles in his prior conduct, as well as to a plaintiff who has dirtied his hands in  
8 acquiring the right presently asserted.” *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085,  
9 1091–92 (C.D. Cal. 2016). “In applying the unclean hands doctrine, the relevant inquiry is . . . whether  
10 the manner of dirtying renders inequitable the assertion of such rights against the defendants.” *Pom*  
11 *Wonderful LLC v. Welch Foods, Inc.*, 737 F. Supp. 2d 1105, 1110 (C.D. Cal. 2010) (brackets and quotation  
12 marks omitted; emphasis added). “The burden is on the one coming into a court of equity for relief to  
13 prove not only his legal rights but his clean hands.” *Russell v. Soldinger*, 59 Cal. App. 3d 633, 646 (1976)  
14 (citation omitted). Here, as two Congressional investigations determined, probable cause exists to  
15 believe that Plaintiffs violated the law, Defendants discovered and publicized such violations, and that  
16 discovery led Plaintiffs to engage in a cover up. *See* Dkt. 303-3, 307. Accordingly, it would be inequitable  
17 to not permit Defendants to show the jury the dirt on Plaintiffs’ hands.

##### 18                   3.4.2. *Public Policy*

19           “[A] promise [will be found] unenforceable if the interest in its enforcement is outweighed in  
20 the circumstances by a public policy harmed by enforcement of the agreement.” *United States v.*  
21 *Northrop Corp.*, 59 F.3d 953, 958 (9th Cir. 1995). Thus, Defendants are entitled to prove that the  
22 contracts they allegedly entered into are unenforceable as a matter of public policy due to Plaintiffs’  
23 violation of federal and state law. *See, e.g., Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850,  
24 853 (10th Cir. 1972), *cited with approval in Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001) (Breyer, J.,  
25 concurring) (“It is public policy . . . everywhere to encourage the disclosure of criminal activity. . . .  
26 [Here], the appellee may reasonably have felt that in adhering to the terms of its contract with the  
27 appellants it was silently watching a crime being committed.”). In *NAF v. CMP*, this Court considered  
28 *the merits* of the public policy defense and analyzed whether the evidence presented in the preliminary

1 injunction record would cause the contracts to be unenforceable. *NAF v. CMP*, No. 15-CV-03522-  
2 WHO, 2016 WL 454082, at \*19–21 (N.D. Cal. Feb. 5, 2016), *aff'd*, 685 Fed. Appx. 623, 627 (2017).  
3 Although the defense was rejected at that stage, it was considered, showing that with additional  
4 discovery it could be meritorious at trial.

5 *3.4.3. Impeachment.*

6 “[I]nformation that could be used to impeach a likely witness, although not otherwise  
7 relevant to the claims or defenses, might be properly discoverable.” Fed. R. Civ. P. 26 Adv. Comm.  
8 Note to the 2000 Amend.; *see also Newsome v. Penske Truck Leasing Corp.*, 437 F. Supp. 2d 431, 436  
9 (D. Md. 2006). Here, as laid out in the Jonna declaration, ¶¶ 9–14, Plaintiffs have repeatedly  
10 stated—not only that they did not make a net profit from their fetal tissue sales—but that they did  
11 not violate the law. Because Defendants’ public statements about Plaintiffs’ illegality, and Plaintiffs’  
12 repeated disavowal of any wrongdoing, are at the heart of this case, and impeachment regarding  
13 Plaintiffs’ statements would be relevant to many aspects of the case (including credibility),  
14 Defendants are entitled to discovery to show that Plaintiffs did, in fact, violate the law.

15 **MOTION TO COMPEL REGARDING DEFENDANTS’**  
16 **CAL. PEN. CODE § 633.5 DEFENSE**

17 “Nothing in Section . . . 632 . . . prohibits one party to a confidential communication from  
18 recording the communication for the purpose of obtaining evidence reasonably believed to relate to  
19 the commission . . . of . . . any felony involving violence against the person.” Cal. Pen. Code § 633.5.  
20 “Murder is the unlawful killing of a human being.” 18 U.S.C. § 1111. “[T]he word[] ‘person’ . . .  
21 include[s] every infant member of the species homo sapiens who is . . . complete[ly] exp[elled] or  
22 extract[ed] from his or her mother . . . at *any stage of development*, who after such expulsion or  
23 extraction breathes or *has a beating heart*.” 1 U.S.C. § 8 (emphasis added).

24 In determining “reasonableness” under § 633.5, “both the question of what [the recorder]  
25 actually believed at the time of recording . . . and whether that belief was reasonable would need to  
26 be resolved in order for [the recorder] to be exempted from liability.” *Kuschner v. Nationwide Credit,*  
27 *Inc.*, 256 F.R.D. 684, 689 (E.D. Cal. 2009). “[A]fter-acquired evidence ‘may shed light’ on the  
28 objective reasonableness of a [person’s] actions at the time.” *E.M. ex rel. E.M. v. Pajaro Valley Unified*

1 *Sch. Dist. Office of Admin. Hearings*, 652 F.3d 999, 1004 (9th Cir. 2011).

2 Here, Defendants’ “Human Capital Project” investigated, documented, and reported on  
3 illegal and unethical fetal tissue procurement practices in the abortion industry, with a special  
4 emphasis on the Planned Parenthood organization, after it was discovered that they were one of the  
5 most egregious violators of federal and state laws and ethical norms. As laid out in the Daleiden  
6 declaration, Defendants consulted numerous experts and whistleblowers who led them to believe  
7 that certain fetuses were harvested even though they met the legal definition of a “person” and thus  
8 were entitled to the same rights as any other person. Thus, Defendants intend to argue that, because  
9 they fit within § 633.5, none of their recordings violate Cal. Pen. Code § 632.

10 Defendants further assert that the truth of their beliefs will provide both direct and  
11 circumstantial evidence that such beliefs were reasonable. Plaintiffs have countered that the  
12 reasonableness of Defendants’ beliefs can only be established based on what Defendants knew at the  
13 time they recorded. But Plaintiffs’ position is untenable. If Plaintiffs intend to respond to  
14 Defendants’ § 633.5 argument by stating that their facilities do *not* have born-alive infant cases, then  
15 Defendants need discovery to test that claim. Otherwise, Plaintiffs should be precluded from  
16 disputing that their facilities have unlawful born-alive infant cases—including the PPMM clinic  
17 where Ms. O’Donnell stated she experienced one.<sup>6</sup>

18 Here, as laid out in the Separate Statement, Defendant CMP requests that the Court order  
19 Plaintiffs to produce documents responsive to five requests: Nos. 20, 21, 22, 24, and 25. Nos. 20  
20 through 22 seek emails to be produced based on a word search. Nos. 24 and 25 seek discretely  
21 identified documents about born alive infants and the procurement of fetal tissue from them.  
22 Plaintiffs have refused to meet and confer on this issue, so Defendants have no means of establishing  
23 the burden aspect of proportionality. The documents are indisputably relevant and the burden is on  
24 Plaintiffs to show that discovery should not be allowed. Order, Dkt. 226 at 5:26–28.

25  
26 \_\_\_\_\_  
27 <sup>6</sup> Ms. O’Donnell recently passed away and thus will be unavailable to testify at trial. *See* Daleiden  
28 Decl., Ex. 32. This is a further basis for permitting discovery to establish the truth of her statements.

1 Respectfully submitted on December 5, 2018,

2 

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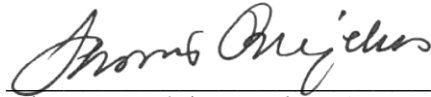
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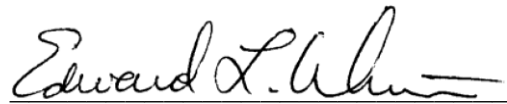
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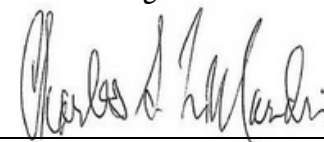
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#### ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

As the filer of this document, I attest that  
concurrence in the filing was obtained from  
the other signatories.



Charles S. LiMandri

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**CERTIFICATE OF SERVICE**

*Planned Parenthood, et al. v. The Center for Medical Progress, et al.*  
Case No.: 3:16-cv-00236

I, Kathy Denworth, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9520, Rancho Santa Fe, California 92067, and that I served the following document(s):

- **Defendants CMP, BioMax, Daleiden and Newman's Motion to Compel Production of Documents from Plaintiffs; and Defendant Newman's Motion to Compel Response to Interrogatory from Plaintiffs;**
- **Separate Statement Pursuant to N.D. Cal. Civ. L.R. 37-2 in Support of Defendants CMP, BioMax, Daleiden and Newman's Motion to Compel;**
- **Declaration of Paul M. Jonna, Esq. in Support of Defendants CMP, BioMax, Daleiden and Newman's Motions to Compel;**
- **Declaration of Edward L. White, III, Esq. in Support of Defendants CMP, BioMax, Daleiden and Newman's Motions to Compel;**
- **Declaration of Jeffrey M. Trissell, Esq. in Support of Defendants CMP, BioMax, Daleiden and Newman's Motions to Compel;**
- **Declaration of David Daleiden in Support of Defendants CMP, BioMax, Daleiden and Newman's Motions to Compel.**

on the interested parties in this action by emailing a true copy addressed as follows:

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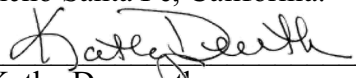
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X **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

X **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on December 5, 2018, at Rancho Santa Fe, California.

  
Kathy Denworth